4061. Alleged misbranding of eggs. U. S. v. Schallinger Produce Co. Information quashed. Judgment of dismissal. (F. & D. No. 5401. I. S. No. 437-e.)

On May 28, 1914, the United States attorney for the Eastern District of Washington, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district an information against the Schallinger Produce Co., a corporation, Spokane, Wash., alleging shipment by said company, in violation of the Food and Drugs Act, on or about November 22, 1912, from the State of Washington into the State of Idaho, of a quantity of eggs charged to have been misbranded. The product was labeled: "One Dozen Premium Eggs Strictly New Laid Absolutely Reliable Notice to Consumers *We Guarantee the Eggs* in this Carton to be carefully selected for *Freshness, Size and Cleanliness. The Seal* on outside is placed there *For Your Protection.* Be sure to see that it is not broken. *Watch the Date.* These eggs are intended to reach the consumers within one week from date shown on seal, and during that time we gladly replace any that are not as represented. Schallinger Produce Co. Spokane. Always insist on getting Premium Eggs The Brand that Never Disappoints. Premium Eggs. Guaranteed Only When Seal is not Broken Watch the Date Put Up. Nov. 22, 1912." (Premium slip) "Save this coupon—one in every dozen of Premium Eggs Realizing the demand for really dependable eggs, we have met the issue and recommend to all lovers of good eggs our Premium Brand. Premium Eggs are always the best Eggs obtainable, and we get them from our Farmer patrons, who bring us their cream. These Eggs are brought in fresh every day and the date on the carton shows when they were packed, and is there for your protection. Recommend Premium Eggs to your friends. They will be pleased to know about them. Schallinger Produce Co. R. R. and Cedar St., Spokane."

Examination of a sample of the product by the Bureau of Chemistry of this department showed that in 1 dozen eggs examined there was 1, or 8⅓ per cent, of the quality of Fresh Eastern, the remainder of the dozen, namely, 11 eggs, or 91⅔ per cent, were found to be stale or storage eggs. Upon opening a hot hard-boiled egg, also in poaching one of the eggs, a stale odor was noticeable in each case. The whites of the uncooked eggs were rather thin and watery.

Misbranding of the product was alleged in the information for the reason that the label thereof bore the following statements, to wit, "Premium Eggs Strictly New Laid Absolutely Reliable," and "*We Guarantee the Eggs* in this Carton to be carefully selected for *Freshness, Size and Cleanliness*," which said statements were false and misleading in that they purported and represented said article of food to be fresh eggs, whereas in fact the same were not fresh eggs, but were in fact stale eggs. Misbranding was alleged for the further reason that the article was labeled and branded so as to deceive and mislead the purchaser into the belief that the contents of the cartons were fresh, newly laid eggs, whereas in fact said contents were not fresh, newly laid eggs, but were in fact stale eggs.

On June 17, 1914, the defendant company filed its motion to quash the information, and on September 30, 1914, said motion was argued and submitted to the court. On October 5, 1914, the motion to quash the information was sustained, as will more fully appear from the following decision by the court (Rudkin, *D. J.*):

Section 2 of the act of Congress of June 30, 1906, declares:

"That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adul-

terated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court. * * *."

Section 3 declares:

"That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country."

Section 4 declares:

"That the examination of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act has been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States District Attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid."

Section 5 declares:

"That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided."

Section 12 declares, among other things, that the word "person" as used in the act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations.

The information filed in this case by the United States attorney under the foregoing provisions recites that the information is filed with leave of court first had and obtained, and "gives the court here to understand and be informed, upon the oath of Abraham L. Knisely and Duncan A. McIntyre, of Fred Nelson, and of Daniel N. Walsh, whose affidavits are hereto attached and made a part hereof as follows, to wit: * * *."

The information then charges that the defendant, a corporation organized under the laws of the State of Washington, with its principal office and place of business in the city of Spokane, did, on or about the 22d day of November, 1912, contrary to the provisions of the foregoing act, ship and deliver for shipment in interstate commerce from the city of Spokane, State of Washington, to the city of Coeur d'Alene, in the State of Idaho, consigned to Nelson Bros. at Coeur d'Alene, in the State of Idaho, certain cases containing eggs, and that the article of food so shipped was misbranded.

To the information are attached the four affidavits therein referred to. The first two were taken before a notary public in the State of Oregon; the third before a notary public in the State of Idaho, and last, before the clerk of the District Court of the United States for the Northern District of West Virginia. The defendant has appeared specially and moved to quash the information on the grounds, first, that the affidavits thereto attached fail to show probable cause for the prosecution and are insufficient to support the information, and second, because the information does not charge a crime under the act of Congress in question.

At common law an information might be filed by the Attorney General simply on his oath of office and without verification; and it has generally been held in this country, following the common-law rule, that verification of an information by the prosecuting officer is unnecessary unless required by some statutory or constitutional provision. There is no law of the United States requiring verification of informations by the prosecuting officer, but a verification of some kind is no doubt indispensable under the fourth amendment to the Constitution where a warrant of arrest is sought or applied for. See Weeks *v.* United States, decided by the Circuit Court of Appeals for the Second Circuit June 18, 1914, where this question is fully considered. Inasmuch as this prosecution is against a corporation where no warrant of arrest is applied for or can be issued, I am of opinion that an information filed by the United States attorney under the sanction of his official oath, and without verification, would be sufficient. But the information under consideration was not so filed, for it expressly states upon its face that it is upon the oath of the several parties named in the annexed affidavits. Unless I am at liberty to consider these affidavits, therefore, the information has no sanction whatever. As already stated, the three principal affidavits were taken before notaries public in other States, and the fourth, standing alone, is of no avail. The question, therefore, arises, Can these affidavits, taken before notaries, be considered by the court? I am of opinion that they can not.

In United States *v.* Curtis (107 U. S., 671, 673), the court said:

"So that the underlying question is whether the notary public, whose commission is from the State, was, at the respective dates of the oaths taken by Curtis, authorized by the laws of the United States to administer such oaths.

"This question we are constrained to answer in the negative. We are not aware of any act of Congress which gave such authority to notaries public in the different States at the several dates given in the indictment. The Assistant Attorney General insists that such authority may be found in section 1778 of the Revised Statutes, which declares: 'In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any State or Territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any State, district, or Territory, or any of the commissioners of the circuit courts, and, when certified under the hand and official seal of such notary or commissioner shall have the same force and effect as if taken or made by or before such justice of the peace.'

"The authority of the notary to administer these oaths to Curtis can not be derived from that section, unless, at the dates in question, they could, under the laws of the United States, have been taken before justices of the peace in Missouri. But the latter officers have no such authority by any Federal statute to which our attention has been called, or which we are able to find. Section 1778, so far as notaries public are concerned, embodies the substance of similar provisions in the acts of September 16, 1850, chapter 52, and July 29, 1854, chapter 159, and section 20 of the act of June 22, 1874, chapter 390. But nothing in these acts, even if they remained in force after the adoption of the Revised Statutes, supports the authority exercised by the notary public who administered these oaths to defendant.

"Counsel for the United States further insists that a proper construction of section 1778 will authorize a notary public in *any* State to administer oaths to officers of national banking associations, when making reports to the Comptroller of the Currency, if justices of the peace may lawfully do so in this District. But in our judgment no such interpretation of that provision is admissible. What Congress intended by that section was to give notaries public in their respective States the same authority, in the administration of oaths, as is given, under the laws of the United States, to justices of the peace in the same States; and to notaries public in this District the same authority, in administering oaths, which, under the laws of the United States, might be exercised by justices of the peace in this District. We have seen, however, that to justices of the peace, in the several States, such authority had not been given by any provision in the Revised Statutes or by any act of Congress prior to their adoption.

"Nor can any support for the indictment be derived from the act of August 15, 1876, chapter 304, which declares 'that notaries public of the several States, Territories, and the District of Columbia, be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do.'

"The power of commissioners of the Circuit Court did not, at the passage of that act, extend to the taking of oaths to reports by officers of national banks. They could take affidavits when required, or allowed in any civil cause in a circuit or

district court (Rev. Stat., sec. 945; act of Feb. 20, 1812, ch. 25; act of Mar. 1, 1817, ch. 30); or administer oaths where, in the same State, under the laws of the United States, oaths, in like cases, could be administered by justices of the peace (Rev. Stat., sec. 1778); or they could take evidence, affidavits, and proof of debts in proceedings in bankruptcy (Rev. Stat., secs. 5003, 5076; act of Mar. 2, 1867, ch. 176; sec. 3 of the act of July 27, 1868, ch. 253; sec. 20 of the act of June 22, 1874, ch. 390). But the authority of commissioners did not extend to such oaths as were administered to Curtis."

It follows from this decision that a notary public has no authority under the laws of the United States to administer any oaths in connection with criminal prosecutions. The United States attorney frankly conceded this on the argument, but contended that inasmuch as this is a prosecution against a corporation, commenced by summons, it must be deemed to be a civil action. To this proposition I can not yield assent. All persons, whether natural or artificial, stand upon an equal footing before the criminal laws of the country. True a corporation, by reason of its inherent nature, can not commit certain crimes, and may not be arrested or imprisoned; but a proceeding against it for the violation of a criminal statute is, and must be, in its very nature, a criminal proceeding with all the incidents of such a proceeding until the legislature has declared otherwise. Believing, therefore, that the information in itself is insufficient because not under the sanction of the official oath of the United States district attorney, and that I may not consider the affidavits of notaries thereto attached, the motion to quash must be granted, and it is so ordered.

Thereafter, on October 7, 1914, a judgment was entered dismissing the case in accordance with the foregoing decision.

C. F. MARVIN, *Acting Secretary of Agriculture.*

WASHINGTON, D. C., *November 17, 1915.*

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4062. Misbranding of stock feed. U. S. v. James Emison et al. (J. & S. Emison & Co.). Plea of guilty. Fine, $200 and costs. (F. & D. No. 5415. I. S. No. 15064-d.)

At the November, 1914, term of the District Court of the United States for the District of Indiana, the grand jurors of the United States within the aforesaid district, acting upon a report by the Secretary of Agriculture, upon presentment by the United States attorney for said district, returned an indictment against James Emison and Scott Emison, composing members of J. & S. Emison & Co., a copartnership, doing business under that name and under the name of Baltic Mills, Vincennes, Ind., charging shipment by said defendants, in violation of the Food and Drugs Act, on February 16, 1912, from the State of Indiana into the State of Ohio, of a quantity of stock feed which was misbranded. The product was labeled: (On bags) "Baltic Mills 100 Lbs. A M O Syrup Feed Manufactured by J. & S. Emison & Co., Vincennes, Ind." (On tags) "100 lbs. J. & S. Emison & Co., Baltic Mills of Vincennes, Ind., guarantees this A M O Syrup Feed to contain not less than Crude protein 12%; crude fat 5%; fiber 12%; carbo-hydrates (starch and sugar) 65%; and compounded from the following ingredients: corn, oats, alfalfa meal, grain screenings, and molasses."

Analysis of a sample of the product by the Bureau of Chemistry of this department showed the following results:

Moisture (per cent)	21.34
Ether extract (per cent)	2.40
Protein (per cent)	8.63
Crude fiber (per cent)	8.04

Microscopical examination showed that the product consisted of corn, oats, alfalfa, a trace of weed seeds and chaff, and a considerable amount of barley tissue (about 5 per cent); the barley had been malted.

Misbranding of the article was charged in the indictment for the reason that the statements "Crude protein 12%" and "crude fat 5%," borne on said bags and packages in which the product was contained, were false and misleading because said product did not contain 12 per cent of crude protein, but contained a smaller per cent of said substance; and because said product did not contain 5 per cent of crude fat, but contained a smaller per cent of crude fat. Misbranding was charged for the further reason that the statement, "compounded from the following ingredients: corn, oats, alfalfa meal, grain screenings and molasses," borne on each of the packages as aforesaid, was false and misleading in that said product contained an ingredient other than those enumerated in said statement, to wit, malted barley, which was not stated in the brand and label aforesaid as an ingredient of said product, and the presence of said malted barley in said substance was not stated in the label and brand on each of the said packages. Misbranding was charged for the further reason that the article was labeled and branded as aforesaid, so as to deceive and mislead the purchaser thereof into the belief that it contained 12 per cent of crude protein and 5 per cent of crude fat, whereas, in truth and in fact, said product did not contain 12 per cent of crude protein, but contained a less amount of said ingredient, and in that said product did not contain 5 per cent of crude fat, but contained a less amount of said ingredient. Misbranding was charged for the further reason that the article was labeled and branded as aforesaid so as to deceive and mislead the purchaser into believing that it contained corn, oats, alfalfa meal, grain screenings and molasses, and no other ingredients, whereas, in truth and in fact, it contained another ingredient, namely, malted barley, the presence of which said last-named ingredient was not declared on the label of said product on each bag and package containing said product as aforesaid.

On February 25, 1915, the defendants entered pleas of guilty to the indictment, and the court imposed a fine of $100 upon each defendant, making an aggregate fine of $200 with costs.

C. F. MARVIN, *Acting Secretary of Agriculture.*

WASHINGTON, D. C., *November 17, 1915.*